Yearworth v North Bristol NHS Trust
[2009] EWCA Civ 37, [2010] QB 1, [2009] 3 WLR 118, [2009] 2 All ER 986 CA

Summary

Six men underwent chemotherapy at the defendant's hospital. Each of them was warned that the course of chemotherapy might damage his fertility and was invited to supply some sperm which the defendant would store for him, and which could be used in the event that the chemotherapy damaged his ability to have children normally. Each of the men took up the option of having some of his sperm stored by the defendant. To preserve the sperm, it was frozen by storing it inside tanks of liquid nitrogen. Unfortunately, at some point the level of liquid nitrogen in the tanks was allowed to fall and the sperm thawed out and was permanently damaged – with the result that if any of the men did experience a permanent loss of fertility due to their course of chemotherapy, there was no way they would be able to have children.

It was claimed that five of the men suffered a psychiatric illness on being told this news. Three of those men subsequently recovered their fertility at some point after their course of chemotherapy was over, and sued for damages for the psychiatric illness that they claimed to have suffered up until the point where they heard the could have children again. One of the five seemed to be infertile even before undertaking chemotherapy, but was still suing for damages for the ongoing psychiatric illness he claimed to be suffering as a result of knowing that the destruction of his sperm definitely meant that he could not have children. The fifth man had died, and his estate was suing for the psychiatric illness it was claimed he suffered up until the moment he died because he thought the destruction of his sperm meant he could not have children. The sixth claimant in the *Yearworth* case did not suffer a psychiatric illness, but sued for damages for the distress (falling short of a psychiatric illness) he experienced when he realised that he might not be able to have children anymore.

At first instance, the claimants sued the defendant in negligence, and their claims were dismissed. In the Court of Appeal, arguments were made that the sperm supplied by each of the men in this case belonged to the person who had produced it, and that that sperm was held by the defendant on a bailment for the person who had produced it, with the result that the defendant could be sued in bailment for the damage done to the sperm, and the consequential psychiatric illness or distress suffered as a result. The Court of Appeal accepted these arguments.

The Court of Appeal held that the sperm did amount to property that was legally owned by the men who supplied it even after it had left their body. The Court of Appeal noted the suggestion in the High Court of Australia's decision in *Doodeward* v *Spence* (1908) 6 CLR 406 that a body part could amount to property if some work had been done on it, or some skill applied to it. It thought that such a principle could apply here to establish that the sperm amounted to property that was capable of being owned by the men who supplied it, as the sperm had been frozen in tanks of liquid nitrogen. However, the Court of Appeal was 'not content to see the common law in this area founded upon the principle in *Doodeward*...[as] a distinction between the capacity to own body parts or products which, and which have not, been subject to the exercise of work or skill is not entirely logical' ([45](d)). The Court of Appeal rested its decision that the sperm supplied by the men in this case amounted to property that belonged to those men on the facts that 'By their bodies, they alone generated and ejaculated the sperm... The sole object of their ejaculation of the sperm was that, in

certain events, it might later be used for their benefit...[the] sperm [could not] be stored or continue to be stored without their subsisting consent [under the terms of the Human Fertilisation and Embryology Act 1990]...no person, whether human or corporate, other than each man [who supplied the sperm had] any *rights* in relation to the sperm which he...produced' ([45](f)).

On the issue of whether the sperm was held on a bailment for the person who produced it, the Court of Appeal held (at [49]) that a bailment clearly existed: the defendant took possession of the sperm, and assumed responsibility to the person who produced the sperm that it would take care of it.

It was admitted by the defendant that if a bailment did exist, then the defendant breached the duty of care it owed the men in this case by allowing the sperm to thaw out (at [49](e)).

On the issue of whether the claimants could recover damages for the psychiatric illnesses or distress that they claimed to have suffered as a result of their sperm being damaged, the Court of Appeal held that the damages available to the men should be assessed by reference to the law of contract, rather than the law of tort (at [48](i)). Under the law of contract, damages for distress or psychiatric illness suffered as a result of a breach of contract are available so long as a major object of the contract is the provision of enjoyment, comfort, or peace of mind (at [56]). The Court of Appeal held that as a major object of the bailment relationship in this case was to provide them with peace of mind that they would be allowed to enjoy in future the 'non-pecuniary personal or family benefits' arising from having children (at [57]). Accordingly, damages for the psychiatric illnesses or distress suffered by the claimants as a result of having their sperm damaged would be available, so long as those psychiatric illnesses or that distress was a foreseeable consequence of the defendant's breach of its duty of care under the bailment.

Comments

(1) *Body parts as property*. The decision in *Yearworth* breaks new ground in holding that body parts can amount to property even if they have not been subjected to any kind of work or skill. Such a development in the law was probably inevitable given the growing secularisation of society (which deprives people of any sense that their bodies are sacred and cannot be regarded as mere items of property) and the concomitant popularity of the idea that people 'own themselves' and should be allowed to do what they like with their bodies. But how far does *Yearworth* go?

In the film *Presumed Innocent* (massive spoiler alert!), Rusty Sabich's wife has sex with him and secretly collects and stores the sperm he has ejaculated into her. She then murders Rusty Sabich's lover, and plants the sperm inside the lover's dead body, so as to make it look like she was attacked and raped by an intruder. Has Rusty Sabich's wife committed theft in this case, as well as murder?

Suppose that Lucy is a huge fan of Charlie, a major pop star. She spots Charlie having his hair cut in a West End salon. She manages to get inside the salon and collects some of his hair that is lying on the ground. She keeps some of the hair herself and auctions the rest on eBay. Is Lucy guilty of theft? And can she be sued by Charlie for the money she has made from selling 'his' hair?

There are, of course, big distinctions between these cases and the *Yearworth* case – notably, the fact that in *Yearworth* the claimants intended to retain dispositive (as opposed to physical) control over the sperm that they supplied. In contrast, Rusty

Sabich and Charlie had no interest in the sperm or hair that they left behind them. But the trouble with a decision like *Yearworth* is that it puts the law in this area into play, so that people can now start asking – if the sperm in *Yearworth* counted as property, why not the sperm in a *Presumed Innocent* scenario, or the hair in Charlie's case? It will take some time, and a lot of someone's money, to sort these issues out and return the law to a stable state.

(2) *Bailment*. While very forward-looking and modern in its approach to the issue of whether body parts can amount to property, the decision in *Yearworth* is very old-fashioned in a couple of respects. The first is its treatment of the law on bailment as standing apart from the law of tort, and the liability of a bailee for failing to take care of the bailed property as being 'sui generis' (at [48](h)). Readers of McBride & Bagshaw, *Tort Law*, will know that we take a very different view. There seems to us no reason at all why the law on bailment should not be treated as part of the law of negligence, and the duty of care that a bailee owes a bailor treated as just another duty of care just like all the other duties of care we owe each other. (For the same reason, we are puzzled at reviewers of McBride & Bagshaw who criticise it for dealing with the law on occupiers' liability as part of the law of negligence and argue that that area of the law is somehow distinct from the law of negligence.) The only reason the Court of Appeal could offer for saying that that the law on bailment was independent of the law of tort was that 'the measure of damages may be more akin to that referable to breach of contract rather than to tort' (at [48](i)). That takes us on to the second old-fashioned element to the *Yearworth* decision.

(3) *The tort/contract divide*. Academics in the 1970s and 1980s used to be obsessed with trying to spell out what the difference was between actions in tort and actions in contract. And academics who learned their law during those years still argue over such matters, arguing that tort protects the 'status quo interest' and contract protects the 'expectation interest', or that tort protect 'normal expectancies' and contract protects 'entitled results'. Now – I hope – we know better: there is no essential difference between the measure of damages in tort and the measures of damages available when someone commits a breach of contract. The essential object of such awards is, in both cases, to put the victim of a wrong in (roughly) the position he or she would have been in had the wrong not been committed, so far as a money award can do such a thing. The apparent contrast between damages awarded in tort and damages awarded in contract arises out of the fact that in a tort case, the wrong usually consists in making someone worse off in some way (so that the damages awarded restore the victim of the tort to the position he or she was in before the tort was committed); whereas in a breach of contract case, the wrong usually consists in failing to make someone better off in some way (so that the damages awarded put the victim of the breach in the position he or she would have been in had he or she been made better off in that way). But this apparent contrast is merely apparent: the damages in both cases are performing exactly the same function.

Some might say 'But what about the rules on remoteness of damage? They are different in tort and in contract.' No they are not – again, they only appear to be different. The basic difference is that if A commits a tort in relation to B, A will usually only be held liable for a loss suffered by B as a result of that tort if it was reasonably foreseeable *at the time A committed his tort* that B would suffer that kind of loss if A committed that tort. In contrast, the rule in contract law is more restrictive. That rule says that if A breaches a contract with B, A will usually only be held liable

for a loss suffered by B as a result of that breach if it was reasonably foreseeable *at the time A entered into the contract with B* that B would suffer that kind of loss if A breached the contract with B. The time element is different. In tort, we look at what was foreseeable at the time the tort was committed. In contract, we look at what was foreseeable at the time the contract was entered into, not at what was foreseeable at the time the contract was breached. The reason for the difference is that adopting the tort rule in contract cases creates a potential for unfairness. A should not be held liable in contract for a loss suffered by B unless he had a fair chance to factor the possibility that he might be held liable for that loss into his decision whether to enter into a contract with B in the first place, and if so, on what terms. So if A had no way of knowing, at the time he entered into the contract with B, that B might suffer a particular kind of loss if A breached the contract, A should not be held liable for that loss because A's ignorance of the fact that that loss might be incurred as a result of his breaching his contract with B means that he could not have factored the possibility he might be held liable for that loss into his decision whether or not to enter into a contract with B, and if so, on what terms.

Once we understand this, we will see that the contract rule for remoteness of damage should be applied in certain tort cases as well – that is, in cases where A has committed a tort in relation to B, but the foundation for that finding is that A *assumed a responsibility* to B not to act in the way he did. In such a case, A should not be held liable for a loss suffered by B as a result of A's tort if it was not foreseeable that B might suffer that kind of loss *when A initially assumed a responsibility to B*. Fairness demands that A not be held liable for this loss because had he known he might be held liable for it, he might have refused to assume a responsibility to B in the first place.

So there is no reason to think that there is one remoteness rule that applies in tort cases and another remoteness rule that applies in contract cases. There is but one set of remoteness rules, which apply in both tort and contract cases – but which part of that set of remoteness rules will apply in a given case will depend on what sort of wrong the defendant is supposed to have committed.

The same point applies to the kind of damage that can be sued for in tort and contract. The Court of Appeal seemed to think that in this case it was much more straightforward to sue for psychiatric illness and distress if the claimants brought their action against the defendant under the law of bailment rather than the law of negligence. But – again – that's simply not true. Had the claimants founded their case on a breach of a duty of care arising under a *Hedley Byrne* style assumption of responsibility, there is no reason to think that it would have been any more difficult for the claimants to recover damages for their psychiatric illness and distress than it was in this case. The claimants would have to have shown that their psychiatric illness and distress were a reasonably foreseeable consequence of the defendant's breach of the duty of care that it owed them and – under the *SAAMCO* principle – the claimants would also have to have shown that the defendant's assumption of responsibility to the claimants was designed, in whole or in part, to safeguard them against the type of losses for which they were now suing. That is exactly the same approach as the Court of Appeal adopted in this case to see whether the claimants could sue the defendant under the law of bailment for their psychiatric illnesses and distress.

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